Physician Compensation

November 12, 2010

Kim Harvey Looney
kim.looney@wallerlaw.com
615-850-8722

Donna Gilley
dgilley@lbmc.com
615-309-2376
Brief Overview of Regulatory Framework
Physician Compensation

- Anti-Kickback Statute (AKS)
- Stark
Anti-Kickback Statute

- Criminal law prohibits the offer, payment, solicitation or receipt of remuneration (i.e. anything of value) to induce or reward referrals of items or services payable by federal healthcare programs
- Statutory exception for employment
- Regulatory safe harbors protect qualifying arrangements from prosecution; ALL safe harbor requirements must be met
- Some safe harbors require payment at FMV
Stark Law

The Stark Law (42 U.S.C. § 1395nn) states that except as otherwise provided, if a physician (or an immediate family member of a physician) has a financial relationship with an entity that provides designated health services then:

− The physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made by the Medicare program; and

− The entity may not present or cause to be presented a claim or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a prohibited referral.
Stark Law

- The Stark Law is a strict liability statute.
  - No intent to violate is required.
- There is no materiality qualifier or threshold.
  - A “technical violation” of the statute is still a violation.
- Penalties apply regardless of whether there are any questions about the compensation being paid or the services being provided.
Exceptions & Safe Harbors

- AKS Employment
- AKS Personal Services
- Stark Employment
- Stark Personal Services
- Stark Indirect Compensation
- Stark FMV
Anti-Kickback Employment Exception and Safe Harbor (42 USC 1320a-7b(b)); (42 CFR 1001.95 2(i))

- Reasonable
- Employee must be “bona fide” (meet IRS test at 26 USC 3121(d)(2))
- FMV
- Personal services safe harbor similar to Stark personal services exception (42 CFR 1001.95 2(d))
- Arms length negotiation
- Not based on value or number of referrals
Anti-Kickback Personal Services Safe Harbor  
(42 CFR 1001.9529(d))

- Similar requirements to Stark personal services exception
- Except requires “aggregate” compensation to be “set in advance”
- Disallows percentage based or per-click compensation or other methods where total amount cannot be determined from terms of agreement
Stark Employment Exception
(42 CFR 411.357(c))

- Excepts amount paid by employer to **bona fide** employee physician for services if:
  - Employment for identifiable services
  - Payment is consistent with **FMV** of the services and;
  - Payment is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician
  - Payment is under an agreement that would be **commercially reasonable** even if no referrals were made to the employer
  - Payment can take form of a productivity bonus based on services personally performed by the physician
Stark Employment Exception
(42 CFR 411.357(c))

- Key terms to consider:
  - “Commercially reasonable”
    - Without any Medicare or Medicaid referrals for DHS to employer
    - But “see special rules on compensation,” (42 CFT 411.351) hospital employers can require employed physicians to refer to hospital facilities if:
      - Employment arrangement complies with employment exception
      - Requirement to refer to specified facilities is in written agreement signed by the parties
      - Requirement does not apply if patient expresses a preference for another provider, patient’s insurer determines another provider, or referral to specified provider would not be in the patient’s best interest
      - Requirement relates solely to physician’s services under employment agreement, and is reasonably necessary to effectuate the legitimate business purpose of the compensation agreement
Stark Personal Services Exception
(42 CFR 411.357(d))

- Expects payment to physician (or group practice) if:
  - Written agreement signed by the parties specifying the services
  - Agreement covers all services to be furnished by physician (or cross references other service arrangements or references master list)
  - Aggregate services do not exceed reasonable and necessary for the legitimate business purpose
  - Term is for at least one year and if terminated with or without cause parties may not enter into similar arrangement during first year of original term
  - Compensation does not exceed FMV and is not determined in manner that takes into account the volume or value of referrals or other business generated between the parties
  - Compensation is “set in advance”
  - Services do not involve counseling or promotion of arrangements that violate federal or state laws
Stark Personal Services Exception
(42 CFR 411.357(d))

- Key terms to consider
  - “Set in advance” requires compensation, including per-unit of service based amount or specific formula for calculation compensation to be stated in agreement **BEFORE the services are performed**
    - Percentage-based, per-click or other formulas are “set in advance”
    - Stark II Phase I commentary clarifies that:
      - Formula must be “set forth in sufficient detail” to allow “objectively verified” and
      - Cannot be charged during term in manner that takes into account the volume or value of referrals
    - Single fee schedule (or percentage of fee schedule) uniformly applied to all services is “set in advance” (66 Fed. Reg. at 856, 877 (January 4, 2001))
Stark Indirect Compensation Exception
(42 CFR 411.354(c))

- Protects compensation under an “indirect compensation agreement” if:
  - Compensation is FMV for items or services actually provided and is not determined in a manner that takes into account the volume or value of referrals or other business generated by the physician for the DHS entity.
  - Arrangement is set out in writing signed by the parties and specifying the services (except if bona fide employment does not require written agreement but must be identifiable services and commercially reasonable even if no referrals made to the employer).
  - Arrangement does not violate the anti-kickback statute or any federal or state law governing billing.
Stark FMV Exception
(42 CFR 411.357(l))

- Protects payment to physician for services if:
  - Written agreement signed by parties identifying services
  - Agreement specifies time frame (which can be any time frame and can include a termination clause so long as parties enter into only arrangement per year)
  - Agreement specifies compensation and “set in advance” and FMV and not determined in manner that takes into account the volume or value of referrals or other business generated by the referral physician
  - The arrangement is **commercially reasonable** and furthers the legitimate business purpose of the parties
  - The arrangement does not violate the anti-kickback statute or federal or state laws governing billing
  - The services do not involve the counseling or promotion of a business arrangement or activity that violates federal or state law
Recent Changes Impacting Physician Compensation
AKS Changes Under ACA

- Now, the government can establish a violation of the Anti-Kickback Statute without showing that an individual knew about the statute’s specific prohibitions or intended to violate the statute. Rather, it means that the government need not prove that a person had the intent to specifically violate the Anti-Kickback Statute, only that a person knew the conduct was unlawful.

- A violation of the Anti-Kickback Statute now constitutes a false and fraudulent claim under the False Claims Act. Before, the government had to prove that the kickback was connected to the submission of a false claim.
Recent Stark Law Changes

Self-Referral Disclosure Protocol

- Authorizes HHS Secretary to compromise payment and penalty amounts owed
  - Consideration of nature and extent of improper or illegal practice, the timeliness of disclosure, provider’s cooperation and any other factors deemed appropriate
2010 Self Referral Disclosure Protocol

CMS Stark Law Disclosure protocol (the “Medicare self-referral disclosure protocol or SRDP)

- Published September 23, 2010
- Limited to actual and potential violations of only the Stark law (if anti-kickback statute is also involved, use the OIG’s Self-Disclosure Protocol)
- 60 days to repay is suspended until a settlement is entered, the disclosing party withdraws from the SRDP, or CMS removes the SRDP
2010 Self Referral Disclosure Protocol

Submissions must include:

- Description of the nature of the matter and type of financial relationship
- Time periods out of compliance
- Parties “believed to be implicated”
- Analysis of why violation of Stark may have occurred
- Potential causes of conduct
- How matter discovered and remedial action taken
- Description of compliance program
- Amount due
- Certification above is true and accurate
When Must an Overpayment Be Returned Under ACA?

- ACA 6402(d)(2)

- An overpayment must be reported and returned... by the later of:
  - (A) the date which is 60 days after the date on which the overpayment was identified; or
  - (B) the date on which any corresponding cost report is due, if applicable
Alternative Method of Compliance: Missing Signatures

- Grace period to obtain signatures on written agreement of
  - 90 consecutive calendar days for “inadvertent noncompliance” with signature requirement
  - 30 consecutive calendar days for knowing noncompliance with signature requirement
STARK III / IV

- Amends compensation exceptions
  - Office space lease arrangements
  - Equipment lease arrangements
  - Fair market value compensation arrangements
  - Indirect compensation arrangements
Percentage-based Compensation: Office Space & Equipment Leases

Rental charges cannot be determined using a formula based on:

- Percentage of revenue raised, earned, billed, collected, or otherwise attributable to services performed on or business generated
  - in the office space or
  - by the use of the equipment
Percentage-based Compensation Prohibition

- Applies only to office space and equipment leases
- Still allowed for
  - personal services arrangements,
  - management contracts
  - physician compensation
Per Click Payments: Office Space and Equipment Leases

- Rental charges for rental of office space or equipment can not be determined using a formula based on –
  - Per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred between the parties
Per Click Payments: Office Space and Equipment Leases

- CMS will monitor block leases
- Caution: Block lease could be considered a “per click” payment depending on length of time for block use and number of procedures which can be done during block time
- CMS uses “once a week for 4 hours” as an example of a small block which may raise concerns
Legal Impact of Inappropriately Paying Physicians
Stark Law – Penalties

Violations of the Stark Law are punishable by:

- Denial of payment for the designated health services provided pursuant to the prohibited referral;
- Civil monetary penalty of up to $15,000 for each prohibited claim;
- Assessment of up to three times the amount of each item or service wrongfully claimed;
- Civil monetary penalty of up to $100,000 for each circumvention scheme; and
- Exclusion from participation in the Medicare and Medicaid programs.
Latest OIG Actions

The Christ Hospital – Cincinnati, OH
- Cardiologist Whistleblower – 2003
- DOJ joined suit in 2008
- Motion to dismiss denied in 2009
- Late May 2010 settlement –
  - 108M – Whistleblower gets 23.5M
  - Assigning / awarding hours in Heart Center based on previous years revenues to the hospital
  - Anti-Kickback
Latest OIG Actions

- South Coast Medical Center (SCMC), California
  - 09-03-2010 settlement 72K - CMPL
  - OIG alleged that SCMC entered into multiple lease and personal services arrangements with doctors that raised compliance issues under the Stark Law and Anti-Kickback Statute.

- Self-Disclosure
Latest OIG Actions

- St. John’s Regional Medical Center (St. John’s), Missouri
  - 06-17-2010 settlement 275K - CMPL
  - OIG alleged that a wholly owned subsidiary of St. John’s entered into an improper financial relationship with a physician. Specifically, St. John’s allowed the physician to be regularly delinquent in rent and paid the physician for services without a written contract in place.

- Self-Disclosure
07-08-2010 United Shockwave Services, United Urology Centers, and United Prostate Centers (collectively, United), Illinois,

- agreed to pay $7,359,500 and entered into a five year CIA for allegedly violating the CMPL provisions applicable to physician self-referrals and kickbacks.
- OIG alleged that United and certain physician-investors used their ability to control patient referrals to obtain contract business from various hospitals.
- Specifically, United threatened hospitals that it would refer patients to competing hospitals if the respective hospital did not agree to a contract with United, or promised hospitals that did contract with United additional referrals.
- Also, United sold more shares to physicians who produced more referrals or other business for the company.
- United had processes for having physicians divest if they did not use United's services sufficiently and offered huge returns on investment with virtually no business risk.

- **NOT Self Disclosed**
Latest OIG Actions

- Mercy Medical Center, Inc. (MMC), Maryland,
  - 07-21-2010 settlement 195K - CMPL
  - OIG alleged that MMC entered into physician service arrangements, lease arrangements, physician on-call arrangements and billing and collection agreements that raised potential issues under the Stark Law and the Anti-Kickback Statute

- Self-Disclosure
Calculating FMV Physician Compensation Using Survey Data
Physician Compensation Benchmarking

- Compensation by Practice Setting
- Compensation by Position Level
- Compensation by Type of Data
Physician Compensation Benchmarking

Compensation by Practice Setting

- **Group practice**
  - AMGA
  - MGMA
  - SullivanCotter (limited)

- **Hospital employed**
  - Hay
  - HCS
  - SullivanCotter
  - WW

- **Academic**
  - MGMA Academic Survey
  - AAMC
Physician Compensation Benchmarking

Compensation by Position Level

- **Staff physician**
  - AMGA
  - MGMA
  - Hay
  - HCS
  - SullivanCotter
  - WW (limited)

- **Faculty level**
  - AAMC
  - MGMA Academic

- **Medical Director/Chief**
  - AAMC (Academic Chief)
  - Hay
  - HCS
  - HIS
  - SullivanCotter
  - WW (limited)
Physician Compensation Benchmarking

Compensation by Type of Data

- **Productivity:** collections, gross patient charges, wRVUs
  - AMGA
  - MGMA
  - SullivanCotter

- **Ratio of TCC to collections, ratio of TCC to GPC and TCC per wRVU**
  - AAMC
  - MGMA
  - SullivanCotter

- **Collections per wRVU**
  - SullivanCotter

- **Practice Expense**
  - MGMA Cost Surveys

- **On-call pay**
  - MGMA
  - SullivanCotter (two surveys)

- **Benefit Costs**
  - AMGA
  - SullivanCotter
What if we have concerns about our physician compensation?

Valuation v. Fair Market Value Opinion on Physician Compensation?
Make Sure There Really Is a Violation...

- Was the physician a pathologist, radiologist, or radiation oncologist?
- Can various documents and signatures be integrated to form a signed agreement?
- Did the agreement renew under state law?
- Do other exceptions apply?

Self-Report if appropriate
Questions?

Kim Harvey Looney  
kim.looney@wallerlaw.com  
615-850-8722

Donna Gilley  
dgilley@lbmc.com  
615-309-2376